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IN THE

Supreme Court of the United States

October Term, 1969.

No. 578.

ANTONIO CORALLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF FACTS	3
A. The Underlying Transaction	3
B. The Indictment	5
C. Herbert Itkin: The Record as to His Role as Informer	6
D. Procedural Handling of Itkin's Informer Status	10
E. Instructions Defining Bribery and Extortion	12
F. Instructions Concerning Accomplice Testimony	14
REASONS FOR GRANTING THE WRIT	16
1. Whether an Undercover Government Agent, Instructed by the FBI to Infiltrate an Alleged Criminal Activity, Can Be Treated in a Subsequent Criminal Conspiracy Prosecution as a Co-Conspirator for Purposes of Admission of Extra-Judicial Statements by Him or to Him	16
2. Whether the Procedure for Confirming That an Avowed Undercover Government Agent Is Such an Officer Should Require Timely Disclosure by the Government to Those Concerned, or, in Cases of Doubt, a Special Finding of Fact by the Court of Submission to the Jury or Both	18
3. Whether, Since There Was Substantial Evidence That a Public Officer Had Approached Prospective Contractors With a View to Obtaining a Kick-Back, the Trial Judge Committed Reversible Error by Failing to Instruct the Jury That Extortion, Under New York Law, May Be Committed "Under Color of Official Right"	24

INDEX (Continued).

Page

4. Whether, Where State Law Demands Corroboration of Accomplice Testimony in Order to Sustain a Conviction, It Was Prejudicial Error Not to So Charge the Jury in a Federal Prosecution Based Upon "Unlawful Activity" as Defined in State Law 27

CONCLUSION 29

APPENDIX A—Opinion of the Court of Appeals 1a

APPENDIX B—Opinion of the District Court Dated March 13, 1968 ..... 57a

APPENDIX C—Order of Court of Appeals Denying Petition for Rehearing 70a

APPENDIX D—Judgment of Court of Appeals 71a

APPENDIX E—Petition for Removal 72a

APPENDIX F—Statutes Involved 78a

TABLE OF CITATIONS.

Cases: Page

Aguilar v. Texas, 378 U. S. 108 (1964) 16
Beck v. Ohio, 379 U. S. 89 (1964) 17
Draper v. United States, 358 U. S. 307 (1959) 17
Grunewald v. United States, 353 U. S. 391 (1957) 21
Hoffa v. United States, 385 U. S. 293 (1966) 17
Jones v. United States, 362 U. S. 257 (1960) 16
Krulewitch v. United States, 336 U. S. 440 (1949) 21
Lewis v. United States, 385 U. S. 206 (1966) 17
Leyra v. Denno, 347 U. S. 556 (1954) 17
Lopez v. United States, 373 U. S. 427 (1963) 17
Mann v. Peoples First Nat'l. Bank & Trust Co., 209 F. 2d 570 (4th Cir. 1954) 8
Massiah v. United States, 377 U. S. 201 (1964) 17
McCray v. Illinois, 386 U. S. 300 (1967) 16
Nardello v. United States, 393 U. S. 286 (1969) 24, 26
On Lee v. United States, 343 U. S. 747 (1952) 17
Osborn v. United States, 385 U. S. 323 (1966) 17
People v. Dioguardi, 8 N. Y. 2d 260, 203 N. Y. S. 2d 870, 168 N. E. 2d 683 (1960) 25
People v. Feld, 262 App. Div. 909, 28 N. Y. S. 2d 796 (2d Dep't 1941) 25
People v. Josie, 134 N. Y. S. 2d 183 (Bronx County 1954) .. 26
People v. Negrin, 24 Misc. 2d 181, 201 N. Y. S. 2d 59 (1960) 27
People v. O'Farrell, 175 N. Y. 323, 67 N. E. 588 (1903) 27
Recznik v. City of Lorain, 393 U. S. 166 (1968) 17
Roviaro v. United States, 353 U. S. 53 (1957) 16
Spinelli v. United States, 393 U. S. 410 (1969) 16
United States v. Chase, 372 F. 2d 453 (4th Cir. 1967) 17
United States v. Wray, 8 F. 2d 429 (D. C. Ga. 1952) 18
Zahn v. Transamerica Corp., 162 F. 2d 36 (3d Cir. 1947) 8

TABLE OF CITATIONS (Continued).

Periodicals: Page

Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920 (1959) 18

Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agents Provocateurs*, 60 Yale L. J. 109 (1951) 22

Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 Supreme Court Review 133 22

Note, 13 U. of Miami L. Rev. 380 (1959) 18

Note, 33 Tul. L. Rev. 393 (1959) 18

Authority:

9 Wigmore, Evidence § 2579 (3d ed. 1940) 8

New York Statutes:

Code of Criminal Procedure § 399 27

1909 Penal Law:

§ 372 2

§ 378 2

§ 850 ..... 2, 5, 25

§ 855 ..... 2, 5

§ 1826 ..... 2, 5

Federal Statutes:

Travel Act, 18 U. S. C. § 1952 ..... 2, 3, 5, 24, 26

28 U. S. C. § 1254(1) 1

28 U. S. C. § 1442(a)(1) 8

18 U. S. C. § 371 5

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Antonio Corallo, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 8, 1969.

OPINIONS BELOW.

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra* (pp. 1a-56a), is not yet reported. The opinion of the District Court of the Southern District of New York reported in 281 F. Supp. 24 is printed herein as Appendix B (pp. 57a-69a).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 8, 1969. Appendix D (p. 71a). A timely petition for rehearing was denied on August 21, 1969 (Appendix C, p. 70a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether an undercover Government agent, instructed by the FBI to infiltrate an alleged criminal activity, can be treated in a subsequent criminal conspiracy prosecution as a co-conspirator for purposes of admission into evidence of extra-judicial statements by him or to him.

2. Whether the procedure for confirming that an avowed undercover agent is such an officer should require timely disclosure by the Government to those concerned or, in cases of doubt, a special finding of fact by the court or submission to the jury or both.

3. Whether, since there was substantial evidence that a public official had approached prospective contractors with a view to obtaining a kick-back, the trial judge committed reversible error by failing to instruct the jury that extortion, under New York law, may be committed "under color of official right."

4. Whether, where State law demands corroboration of accomplice testimony in order to sustain a conviction, it was prejudicial error not to so charge the jury in a Federal prosecution under the Travel Act based upon "unlawful activity" as defined in State law.

STATUTES INVOLVED.

The Federal statutory provision involved, 18 U. S. C. § 1952, is set forth in Appendix F, *infra*, pp. 78a-79a. The relevant provisions of the 1909 New York Penal Law, §§ 372, 378, 850, 855, and 1826, together with § 399 of the New York Code of Criminal Procedure, are set forth in Appendix F, *infra*, pp. 79a-81a.

STATEMENT OF FACTS.

Petitioner, Antonio Corallo, was convicted of conspiracy to violate the Travel Act, 18 U. S. C. § 1952. The one-count indictment charged petitioner along with Henry Fried, Herbert Itkin, James L. Marcus, Daniel J. Motto, Charles J. Rappaport, and S. T. Grand, Inc. Trial by jury was held in the United States District Court for the Southern District of New York. James L. Marcus was severed in advance of trial and pleaded guilty. Herbert Itkin was severed on the day trial began, June 3, 1968. Itkin has not been tried. The principal witnesses for the prosecution were Itkin and Marcus. Rappaport was acquitted by jury verdict. Petitioner, along with Fried, Motto, and S. T. Grand, Inc., was convicted.

The United States Court of Appeals for the Second Circuit (Medina, Waterman, and Kaufman, JJ.) affirmed on appeal.

A. The Underlying Transaction.

James L. Marcus was Commissioner of the New York City Department of Water Supply, Gas & Electricity in 1966. As Commissioner, it became his responsibility to enter into a contract for the draining and cleaning of a reservoir in the Bronx, known as the Jerome Park Reservoir. Because of the nature of the work, no competitive bidding was required. The Commissioner had the authority to select a contractor and negotiate an "emergency contract" with him. Marcus saw in this situation an opportunity to recover from a series of disastrous stock investments. The contract was eventually awarded to the S. T. Grand Company, of which Henry Fried was president. Grand, through Fried, agreed to kick back five percent of the contract price. That kick-back is the transaction underlying this prosecution.

Commissioner Marcus testified at length to the desperate financial situation in which he found himself from purchasing on margin large amounts of stock that dropped sharply in price (201a-205a).[1] He had an urgent need for cash to maintain his investment. His co-venturer in this investment was Herbert Itkin, a lawyer and friend (201a). They borrowed money from several sources, including petitioner and Motto, to deposit in the stock account. By June 1966, they owed approximately $75,000.00 (210a). They decided to try to recoup by asking for a seven and one-half percent kick-back on the Jerome Park Reservoir job that was estimated to run about one million dollars (210a).

Petitioner and co-defendant Motto were implicated as being involved in the negotiations between Itkin and Marcus and the contractor, S. T. Grand, Inc. Henry Fried balked at the high kick-back he was asked for (346a). Eventually a deal was closed with Fried for a five percent kick-back (223a, 363a, 653a). Three of the five percent were to go to Marcus and Itkin; the remaining two to Motto and petitioner (226a, 236a, 496a, 503a, 646a, 647a).

Meanwhile, Commissioner Marcus was exploring alternate possibilities to get a larger amount from the Jerome Park Reservoir job. He found that another contractor, Oakhill Contracting Company, was willing to pay a kick-back of ten percent (233a, 371a-372a). Accordingly, Marcus directed the Water Department's Chief Engineer to draw up a contract awarding the job to Oakhill (152a, 231a, 373a). When Itkin learned of this, he became extremely agitated; he insisted that a firm deal had been made with S. T. Grand, Inc., and that it was too late to change course. Following this talk with Itkin, Marcus directed the Chief Engineer to change the contract papers and draw them instead with S. T. Grand, Inc. (154a, 233a, 656a-657a).

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1. References in this Petition are to the pages of the Appendices filed in the court below and with the Clerk of this Court.

The contract was signed on November 23, 1966 (154a-155a). During the time that work was done on the reservoir and shortly thereafter (from December 1966 through May 1967), S. T. Grand, Inc. made a series of payments which were divided among Marcus, Itkin, Motto and petitioner (238a-264a, 511a-528a).

B. The Indictment.

The indictment against petitioner and his co-defendants charges a conspiracy (18 U. S. C. § 371) to violate 18 U. S. C. § 1952, familiarly known as the Travel Act. Section 1952 makes it a Federal offense to travel in interstate commerce or use a facility of interstate commerce to carry on or promote certain unlawful activities proscribed by State law. The indictment relies upon a few telephone calls from New York to Greenwich, Connecticut, where defendant Motto lives, for the facility of interstate commerce that underlies elevating this State transaction into a Federal offense. The "unlawful activity" that is charged is "bribery in violation of Articles 34 and 170, Sections 372, 378 and 1826 of the Penal Law of the State of New York" (22a-23a). With the consent of counsel for prosecution and defense, section 1826 was eliminated from the case before it was submitted to the jury (1281a). Thus, the indictment as submitted charges only that the defendants used a facility of interstate commerce to commit bribery as defined by New York Penal Law.

Significantly, the indictment does not charge the defendants with the "unlawful activity" of extortion, as defined by sections 850 and 855 of the 1909 Penal Law of New York.

The statutory provisions from the New York Penal Law covering bribery, incorporated in the indictment, and extortion, not charged, are reproduced in Appendix F of this petition.

C. Herbert Itkin: The Record as to His Role as Informer.

Before and at the trial, the prosecution chose to create the appearance that Herbert Itkin was a co-conspirator. As previously indicated, Itkin was named as a defendant in the indictment. He was not severed until the day that the trial began. No explanation was offered for the severance. The severance was made upon motion by the Government. In presenting its case, the prosecution chose to call James L. Marcus to the stand before Herbert Itkin. Marcus's testimony is shot through with references to statements made out of court by Itkin, statements that were admitted into evidence on the theory that they were declarations of a co-conspirator in furtherance of the conspiracy. Following Marcus's testimony, the Government called Itkin to the stand and elicited testimony from him that tended only to show his apparent complicity in an unlawful scheme.

Cross-examination of Itkin produced a radically different image. Itkin testified that he was an undercover agent for the Federal Bureau of Investigation and had been so since 1962, four years prior to the events concerning the Jerome Park Reservoir (550a, 694a, 726a). The following testimony is explicit:

> "Q. You first began informing to the FBI in 1962; is that correct? A. Approximately, yes.
>
> "Q. When you first began to inform, did you tell the FBI it was your purpose to infiltrate organized crime? A. No, I was asked by the FBI to infiltrate organized crime as deep as I could.
>
> "Q. The FBI asked you to infiltrate organized crime? A. That's right.
>
> "Q. Was that your general objective throughout your associationship with the FBI from 1962 until the present? A. Yes, it was.

"Prior to the subject matter of this indictment, did the FBI ever tell you to try and meet a specific person or try to go to a specific place and make contacts? A. They might have at times, yes.

"Q. They gave you instructions as to what to do on some occasions? A. Yes." (802a).

This testimony by Itkin, elicited by counsel for Rappaport, was repetitive of testimony brought out earlier by counsel for other defendants. Indeed, in the middle of the exchange quoted above, Government counsel objected on the ground that the same testimony had come forth "two minutes ago".

Itkin carried out his assignment from the FBI to infiltrate organized crime as deep as he could by posing as a participant in various illegal activities (552a-553a). While from time to time he received instructions from the FBI, "most of the time they left me on my own," he testified (727a). It is quite important to note that Itkin, testifying to acting "on his own", was merely describing the way in which he was left free to devise his own methods for accomplishing the task his FBI mentors had assigned to him.

Itkin vehemently denied that he was guilty of any criminal conduct, in the Jerome Park Reservoir contract kick-back and his other activities. ". . . I did not think I was guilty of a crime because I was working for the Government." (561a). Accordingly, he took it for granted that he would not be prosecuted (753a, 759a), and assumed that he had been named in the indictment only to protect his informer status (772a, 777a). The Government, of course, did move to sever Itkin as a defendant on the day the trial began, and Itkin has not been prosecuted.

Itkin has been prosecuted in State court for the events surrounding the kick-back on the Jerome Park Reservoir job. In the State proceeding, however, Itkin has filed a petition for removal to Federal court under 28 U. S. C.

§ 1442(a)(1). The petition asserts that Itkin was an "informer" for the FBI in these events and was acting under color of his office performing duties incidental to his mission of penetrating organized crime. A copy of this petition, which is still pending, is attached as Appendix E. The court below was furnished a copy of this petition. Judicial notice may be taken of this pleading, since it is a public document. *Mann v. Peoples First Nat'l. Bank & Trust Co.*, 209 F. 2d 570 (4th Cir. 1954); *Zahn v. Transamerica Corp.*, 162 F. 2d 36 (3d Cir. 1947); 9 WIGMORE, EVIDENCE § 2579 (3d ed. 1940).

At no point during the trial, in the face of Itkin's repeated declarations that he had been at all relevant times an undercover agent for the FBI, did the Government even suggest any different possibility. Government counsel maintained complete silence, allowing the testimony of their witness to stand without contradiction or qualification. Had this prime prosecution witness been misrepresenting himself to the court and the jury, surely Government counsel would have interceded to correct the record.

Before the Court of Appeals, Government counsel were more candid. The United States brief admits, albeit in a less than forthright statement, that Itkin had been "an FBI informant for years" (page 43).

In the face of this record, the Court of Appeals made two startling statements finding as a fact that Itkin had not been an undercover agent for the Government: ". . . Nothing in this record supports appellants' claim that [Itkin] participated in the conspiracy as a Government agent. . . . Itkin's participation in this conspiracy was wholly on his own. The record does not sustain appellants' claim that Itkin participated as a Government agent pretending to be a conspirator." Appendix A, *infra*, 31a). The Court of Appeals relies entirely upon one fragment of Itkin's ex-

tensive testimony. In answer to several artful questions from the trial judge, Itkin stated that he was engaged in the Jerome Park Reservoir transaction "on his own" (566a). As indicated earlier, however, Itkin made perfectly clear later what he meant by this phrase. It did not negate his role as undercover agent; it signified that he was acting without specific instructions in carrying out a general mandate to infiltrate organized crime. Thus, this testimony:

> "Q. Mr. Itkin, you devoted your life since 1962 to uncovering underworld elements, is that correct? A. The best that I could, yes.
>
> "Q. Was that your primary objective in life? A. From 1962 on, yes, sir.
>
> "Q. Have you been doing this by yourself? Has this been a one man operation? A. On my part?
>
> "Q. Yes. A. Or with the Bureau? No, I worked alone, if that is what you mean.
>
> "Q. Was the Bureau cooperating with you in this endeavor? A. Yes.
>
> "Q. Did they give you instructions? A. On and off. Most of the time they left me *on my own*.
>
> "Q. Did they tell you what to do on given occasions? A. Oh, yes.
>
> "Q. Did you do what they told you to do? A. Yes.
>
> "Q. Did you do things *on your own*? A. Yes, I did." (726a-727a) (Emphasis added.)

In light of Itkin's detailed testimony that he was an undercover agent for the FBI, that he was acting pursuant to their instructions to infiltrate organized crime, that he was personally guiltless in his activities in connection with the Jerome Park Reservoir contract kick-back, that he had been indicted merely to protect his "cover" and that he

would not be prosecuted, and in light of the allegations in the removal petition filed to stop the State proceedings, it is incredible for any court to state that nothing in the record supports petitioner's claim that Itkin participated in the conspiracy as a Government agent. Itkin's testimony does not stand alone. The Government, not Itkin, moved for his severance on the trial date. Government counsel allowed his trial testimony to stand wholly unrefuted. The Government, not Itkin, admitted in its court of appeals brief that Itkin had been an FBI informer since 1962. An appellate court finding of fact that Itkin's participation in this conspiracy was wholly on his own and not at all as a Government agent is nothing short of judicial "newspeak."

D. Procedural Handling of Itkin's Informer Status.

The question of Itkin's status as an undercover agent for the Government was never frontally resolved in the District Court. As indicated, the Government moved to sever Itkin from the defendants and agreed to dismiss the indictment against him. Thus, the actions of counsel for the Government underscore their acceptance of his repeated assertions that, as an undercover agent, he was guiltless.

Government counsel nevertheless chose to put on their case in chief under the appearance that Itkin was a guilty co-conspirator. Thus, they called to the stand their star witness, James L. Marcus, before Itkin. They extracted from Marcus testimony that is replete with extrajudicial statements to and by Itkin that are admissible only on the theory that Itkin was a member of the conspiracy. The charade was maintained even through the direct examination of Itkin himself.

When cross-examination of Itkin brought out his role as undercover agent, counsel for petitioner moved for a mistrial (596a). The motion was denied on the plainly un-

tenable ground that "a good deal of the evidence was developed by defendants' counsel themselves in cross-examination" (597a).

Later, counsel moved for a more limited remedy of striking testimony of Itkin in so far as he was testifying to conversations not in the presence of petitioner (811a). This motion was renewed and elaborated at the close of the evidence (882a-890a). Both times the motion was denied. On the second occasion, the court indicated that it believed the evidence to be clear beyond any question that Itkin had been on an "independent venture of his own" (910a).

The trial court charged the jury that Itkin had admitted his "individual participation" in the crime charged in the indictment, and that, also, "by his own statement, he has been a government informer since 1962." He went on to tell the jury that the law does not prohibit the use of informers, that the Government ". . . is frequently compelled to rely upon the testimony of accomplices . . . or informers, and that "The fact that Itkin is an informer, as well as the fact that he and Marcus are accomplices, . . . should be considered carefully by you as bearing upon the credibility of each" (1259a-1260a).

Counsel for petitioner duly excepted to the refusal of the trial court to give his requested instruction No. 7, that "One, like Itkin, who acts as a government agent and enters into a purported conspiracy in the secret role of an informant cannot be considered a co-conspirator" (1265a).

While the jury was not called upon to determine that Itkin was an undercover agent for the Government, the question of the guilt or innocence of Charles Rappaport was submitted. The entire thrust of Rappaport's defense was to associate himself with the undercover agent status of Itkin (1247a). Rappaport was an attorney, associated in practice with Itkin (199a, 479a). While Rappaport did not testify,

his counsel's extensive cross-examination of Itkin was designed to develop both Itkin's Government role and Rappaport's nexus with it. The cross-examination extends from page 1274 of the trial transcript to page 1368 (726a-787a). Two witnesses were called for the purpose of testifying to statements tending to show Rappaport and Itkin working together for the United States (1133a, 1140a). The jury returned a verdict of not guilty with respect to Rappaport (1288a).

E. Instructions Defining Bribery and Extortion.

The one-count indictment, as stated above, charged the defendants with a conspiracy to use a facility of interstate commerce to commit the unlawful activity of bribery, as defined by the 1909 New York Penal Law.

Co-defendant Henry Fried raised the defense that he had paid the money under duress. The district court instructed the jury that the distinction between bribery and extortion was a question of fact and, with reference to Fried's defense, that the jury could not find him guilty unless the money had been freely paid by him (1250a-1254a). The court defined extortion by quoting part of section 850 of the Penal Law, as follows:

> "Extortion is the obtaining of property from another, or obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear. . . ." (1239a)

The definition of extortion given to the jury omitted the last clause of the statutory provision. Section 850 provides that extortion can be committed by use of force or fear. It further provides that extortion can be committed

in the obtaining of property "under color of official right." The jury was never instructed that extortion can be committed when a public official obtains money or property "under color of official right."

On the evidence developed at the trial, a plausible case could be made—indeed, the most plausible case could be made—that Commissioner James L. Marcus had committed the offense of extortion by obtaining money under color of official right.

Counsel for petitioner duly excepted to the refusal of the district court to give requested instruction No. 21, as follows:

> "The defense of accepting a bribe and extortion or taking unlawful fees by public officers are different crimes. If you find from all the testimony in this case that there was an unlawful demand by public officers and the use of the facilities in interstate commerce to accomplish that state crime, you must find the defendant, Corallo, not guilty." (1266a)

The Court of Appeals discussed the failure of the trial judge to submit to the jury the question whether Marcus had extorted money from Fried and S. T. Grand, Inc. The Court of Appeals declared that there is no proof of such a scheme by Marcus. The court below went so far as to label the theory "fantastic." (Appendix A, *infra*, p. 38a).

The Court of Appeals ignored the substantial evidence that the essential nature of the transaction involved efforts by Commissioner Marcus to sell public contracts to the highest bidder in illegal kick-backs. Marcus's motive to recoup his heavy debts was known. He had an urgent need for cash to forestall liquidation of his stock holdings at a substantial loss. His office was then due to negotiate and let a large "emergency contract" without competitive bid-

ding. There is evidence tending to show that the Commissioner sought to turn this event to his own profit by demanding a kick-back from the contractors qualified and interested in the work. Through intermediaries, he demanded a full seven and one-half percent of the anticipated one million dollar contract price. The $75,000 he would thus obtain was enough to offset the losses he had suffered in his investment crisis. Indeed, this was how he fixed the amount he demanded. S. T. Grand, Inc., through Henry Fried, resisted this demand and the Commissioner's "fee" was lowered eventually to three percent. Later, after tentative agreement with Fried, the Commissioner found that he could get a larger sum from another firm, Oakhill Construction Co. At the last minute he was dissuaded from this course by Itkin who insisted that a firm deal had been made with S. T. Grand and that it was too late to change.

In short, there was substantial evidence from which a jury could have found that James L. Marcus used his official position to try to extract sums of money from contractors as a condition of their doing business with the City of New York. Unless they agreed to his demanded kick-back, they would be deprived of the valuable business opportunities that he controlled through the Department of Water Supply, Gas & Electricity. Acting thus under color of his office, Marcus could and did demand and obtain illegal payments. If the jury so found, the crime of extortion, not the charged offense of bribery, would be shown.

F. Instructions Concerning Accomplice Testimony.

The court charged the jury that the defendants could be convicted upon uncorroborated testimony of accomplices. The trial judge instructed:

"There is no requirement in the Federal Court that the testimony of an accomplice, an informer, or one with a criminal record be corroborated. A conviction may rest upon the uncorroborated testimony of such a witness if he is found credible and reliable." (1260a).

The trial court specifically refused a request by counsel for petitioner, No. 24, as follows:

"Under the laws of the State of New York, the offense of bribery cannot be proven on the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the testimony with the commission of a crime." (1266a).[2]

The theory of petitioner's request was to harmonize State and Federal law in prosecutions that are essentially based upon violations of State law, here the New York law of bribery. The Court of Appeals held that, even though New York law defined the offense, it was proper to use a Federal standard to determine whether accomplice testimony needs corroboration (Appendix A, *infra*, p. 37a).

2. This request for charge was based upon the uncertainty created by the Government as to Itkin's status. If Itkin was an undercover agent for the Government, as he testified, then he would not also have been an accomplice. The confusion on this was generated by the Government's pretense, and it survived through the submission of the case to the jury. The trial court referred to Itkin as both an accomplice and an informer (1260a). The issue raised by defendant's request for instructions No. 24 is premised on the view, left open to the jury, that Itkin was an accomplice, despite the evidence to the contrary.

REASONS FOR GRANTING THE WRIT.

1. Whether an Undercover Government Agent, Instructed by the FBI to Infiltrate an Alleged Criminal Activity, Can Be Treated in a Subsequent Criminal Conspiracy Prosecution as a Co-Conspirator for Purposes of Admission of Extra-Judicial Statements by Him or to Him.

The first question presented raises a fundamentally important issue concerning the use of undercover agents for the Government in criminal prosecutions. The question focuses on a Government witness who had been instructed to and who did infiltrate an alleged criminal activity. Subsequently, a conspiracy indictment was tried against members of that alleged criminal conspiracy. Can the Government's own undercover agent be treated as a culpable member of that conspiracy for the purpose of admitting into evidence extra-judicial statements by him or to him? This basic question has not yet been answered by this Court.

This Court has made other important decisions concerning undercover Government agents and informants. In *Roviaro v. United States*, 353 U. S. 53 (1957), the Court held that the prosecution must disclose to the defendant the identity of an undercover agent where the charge against the defendant, viewed in connection with the evidence actually introduced, is so closely related to the informer as to make his identity and testimony highly material. *Cf. McCray v. Illinois*, 386 U. S. 300 (1967). Similarly, the Court has developed standards for the sufficiency of undercover agent's information when utilized for the obtaining of a warrant. *Jones v. United States*, 362 U. S. 257 (1960); *Aguilar v. Texas*, 378 U. S. 108 (1964); *Spinelli v. United States*, 393 U. S. 410 (1969). So, too, when the undercover agent's information is used to justify an arrest and search

incident thereto. *Draper v. United States*, 358 U. S. 307 (1959); *Beck v. Ohio*, 379 U. S. 89 (1964); *Recznik v. City of Lorain*, 393 U. S. 166 (1968).

This Court has dealt with the problem of the invasion of privacy entailed when undercover Government agents insinuate themselves into the confidence of persons suspected of crime. *On Lee v. United States*, 343 U. S. 747 (1952); *Lopez v. United States*, 373 U. S. 427 (1963); *Lewis v. United States*, 385 U. S. 206 (1966); *Hoffa v. United States*, 385 U. S. 293 (1966); *Osborn v. United States*, 385 U. S. 323 (1966). The Court has faced and resolved issues arising when confessions are obtained by undercover Government agents. *Massiah v. United States*, 377 U. S. 201 (1964); *Leyra v. Denno*, 347 U. S. 556 (1954).

The Court has not yet dealt with the question posed here when an undercover Government agent continues to pretend to be a member of a criminal conspiracy through the introduction of the prosecution's case in chief. It should be obviously correct on principle that one who acts as a Government agent in the secret role of an informer cannot be a co-conspirator.

There is authority in the lower Federal courts and elsewhere for this proposition. The Fourth Circuit recently said in *United States v. Chase*, 372 F. 2d 453, 459 (4th Cir. 1967):

> "Although a conspiracy may continue even though certain co-conspirators terminate their connection therewith, and may be replaced by other co-conspirators, it cannot be said that this conspiracy continued after April 5, 1965 between Carr and Chase, because it is equally well-established that one who acts as a government agent and enters into a purported conspiracy in the secret role of an informer cannot be a co-conspirator. *Sears v. United States*, 343 F. 2d 139 (5 Cir. 1965)."

See also *United States v. Wray*, 8 F. 2d 429 (D. C. Ga. 1925); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 926 (1959); Note, 13 U. OF MIAMI L. REV. 380 (1959); Note, 33 TUL. L. REV. 393 (1959).

While the question has thus been raised and determined in other forums, this Court has not yet spoken to the important question. It is highly appropriate that the matter be resolved at the highest level. As the spate of recent cases indicates, the Government is making increased use of undercover agents to try to ferret out criminal conduct. The question presented is necessarily recurrent and its resolution is vital to the prosecution process.

Moreover, the issue goes to the very core of this case before the Court. The Government's failure to be candid and forthright with the trial court, the jury, and the actual defendants is an intolerable mode of prosecution, calling for this Court's firm and immediate guidance.

2. Whether the Procedure for Confirming That an Avowed Undercover Government Agent Is Such an Officer Should Require Timely Disclosure by the Government to Those Concerned, or, in Cases of Doubt, a Special Finding of Fact by the Court or Submission to the Jury or Both.

Overruling Herbert Itkin's unqualified testimony that he served as an undercover Government agent in infiltrating the conspiracy charged in this case, the Court of Appeals below engaged in an extensive fact-finding discussion that concluded with that court's finding that Itkin was not such an agent. We will return later to the substance of analysis of the Court of Appeals opinion. What is most significant is the procedure that left the appellate court in the position of making *de novo* such a fundamental finding of fact. Assuming that there can be any doubt on a question of fact of

this nature, the proper place for fact-finding is in the trial court, not the Court of Appeals.

The question presented here is what procedure should be employed in the trial court to deal with testimony like Itkin's testimony that he had infiltrated the negotiations for a kick-back on the Jerome Park Reservoir contract pursuant to instructions from the FBI. Confusion was generated by the Government's decision to include Itkin as a named defendant in the indictment, even though they moved without explanation to sever him on the date trial began. Confusion was compounded when the prosecution chose an order of proof that called James L. Marcus to the stand before Itkin and thus introduced major testimony concerning Itkin's out of court statements and statements to Itkin not in the presence of all defendants. This compounded confusion was aggravated when the Government called Itkin to the stand as a prosecution witness and failed to elicit on direct examination anything concerning his undercover status, allowing that to come forth in the course of cross-examination by counsel for the various defendants.

When, belatedly, Itkin's avowed status as an undercover Government agent came out, the Government did nothing either in re-direct examination or by other witnesses or by any means to counter the testimony of the Government witness that he was a Government agent. The trial judge interjected two questions, obviously leading in character, that produced Itkin's affirmance that he had acted "on his own." In his charge to the jury, the trial judge referred to Itkin as both an accomplice and informer, without recognition that there might be an inconsistency there. The judge refused to charge the jury that one who acts as a Government agent and enters into a purported conspiracy in the secret role of an informant cannot be considered a co-conspirator. The court also refused to strike testimony

admitted under the impression that Itkin was a co-conspirator; likewise, he refused to give limiting instructions.

Through the Court of Appeals, petitioner maintained that the record was clear and uncontradicted that Itkin was an undercover Government agent. The only possible doubt stemmed from the trial court's two questions concerning Itkin acting on his own, but, as Itkin explained later, this meant only that he was acting without specific, detailed instructions. In Itkin's view, he was at all times carrying out his FBI mandate to infiltrate organized crime as deeply as he could.

The Court of Appeals has declared that nothing in the record supports a claim that Itkin participated as a Government undercover agent pretending to be a conspirator. The Court of Appeals quotes the two "leading" questions put by the trial court. The rest of the Court of Appeals' analysis deals with speculation and inference wholly inconsistent with the record.

First, the Court of Appeals notes that none of the defense counsel called as a witness the FBI agent, William Veriker, who had been Itkin's contact with the Bureau. The court goes so far as to cite a passing remark by counsel for petitioner during cross-examination of Itkin when the witness was reluctant, for the moment, to agree to having been very distraught in one meeting with Veriker; counsel said that he would call the agent, but the matter became sufficiently clear a few moments later in the cross-examination. The suggestion by the Court of Appeals that it was the burden of the defense to call agents of the FBI to confirm Itkin's testimony is baseless. Itkin's testimony was clear and persuasive. He testified as a Government witness. The Government severed him from the case.

The Court of Appeals prefaced its discussion of the critical issue of Itkin's status with the following remarkable observation:

> "The path of the prosecutor in a conspiracy case is full of snares and pitfalls. As the conspirators run for cover a favorite diversionary tactic is to spread confusion by pursuing digressions suggested by proof having only a tangential bearing on the case." (Appendix A, *infra,* p. 31a).

The implication that Itkin's status was a tangential issue is incredible. Further, the Court of Appeals' sympathy for the plight of the prosecutor is flatly inconsistent with the teaching of this Court and with common sense. This court declared in *Grunewald v. United States,* 353 U. S. 391, 404 (1957):

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."

This Court cited particularly the famous opinion of Justice Jackson in *Krulewitch v. United States,* 336 U. S. 440, 454 (1949):

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrong-doing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather flock together. If he is silent, he is taken to admit it and if, as so often happens, co-defendants can be prodded into accusing and contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate."

The prosecutors in this case ran afoul of snares and pitfalls of their own creation. It was not the defense that

spread the confusion, such as it is. The Government chose to keep concealed, until the last possible moment, Itkin's relationship with the FBI. Meanwhile, the record was saturated with inadmissible evidence. Further, the defendants were forced to stand trial jointly with Rappaport, whose main line of defense was to prove his own association with undercover agent Itkin in the FBI sponsored effort to infiltrate organized crime, supposedly represented by petitioner and the other defendants.

The Court of Appeals' theory that Itkin was not an FBI agent is marred by the jury verdict acquitting Rappaport. The court below was forced into the awkward position of speculating on reasons for the verdict that might be separate from Rappaport's main defense (Appendix A, *infra,* p. 33a).

The Court of Appeals also speculated freely on certain elements of Itkin's conduct. Itkin admittedly took some of the money distributed to the conspirators, and he delayed making a full report to the FBI on the transaction until it had been completed. Itkin testified on the witness stand as to his reasons for so doing. He was greatly concerned that there would be a leak in his "cover." He testified that he was afraid that premature reports to the FBI would lead to dissemination of the facts to other agencies and would reveal his undercover role too soon (555a, 795a). Itkin viewed himself as "the man in the field," who was taking risks involved in the gathering of information for the Government (556a). As such an operative, he felt that he should pick the time and place to come out from his undercover role (556a).[3]

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3. "Informers and secret agents . . . must be developed or placed over a long period of time and the objective of their 'search' will almost always be broad and impossible to delineate with any precision in advance." Kitch, *Katz v. United States: The Limits of the Fourth Amendment,* 1968 Supreme Court Review 133, 142. See also Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agents Provocateurs,* 60 Yale L. J. 109 (1951).

The Court of Appeals' analysis, in short, consists of a general axiom concerning the plight of prosecutors and the deviousness of defendants in conspiracy cases, a chance remark by defense counsel cited out of context, attenuated inferences from certain ambiguous but explained aspects of Itkin's conduct, and free-ranging speculations on possible bases of the jury's verdict other than that most obvious. At no point does the Court of Appeals deal directly with the extensive, explicit testimony of the avowed undercover agent except for the two questions put by the trial court.

Such a process of dealing with the vital question of the status of a Government witness, who professes to be an undercover agent for the Government, is plainly untenable. Petitioner still maintains that the record in this case is clear and explicit that Itkin was at all relevant times an undercover agent for the FBI. That position is urged, not as a matter of law, as suggested by the Court of Appeals. It is urged as a matter of fact, the only plausible reading of the record in the case. The record facts are supplemented by the Government's belated admission in the Court of Appeals that Itkin had been an FBI informer since 1962. It is further supplemented by the events that have transpired in connection with a State prosecution against Itkin who has successfully sought shelter by a petition for removal of the case to Federal court based upon his duty as a Federal officer.

Should the record be deemed in doubt on the issue of fact, the correct procedure would not place the task of factual evaluation, inference drawing, and credibility weighing in an appellate court. First and foremost, a standard must be developed for the obligation of the Government to avoid the confusion they created in this case by a full and timely disclosure of the Government's position concerning an avowed undercover agent. Government silence in such a situation must be taken as acquiescence.

In cases of genuine factual doubt, the issue should be sharply defined and cleanly resolved in the trial court. Very possibly, a *voir dire* hearing should be held in the manner prescribed by this Court for the determination by the court of the voluntariness of a contested confession. *Jackson v. Denno,* 378 U. S. 368 (1964). As with confessions, if the court finds that the confession is admissible, a factual issue can be tried to the jury.

The procedure for determining the status of undercover Government agents is manifestly in need of this Court's supervisory jurisdiction. The importance of the question is obvious. The need for this Court's guidance is unquestioned.

3. Whether, Since There Was Substantial Evidence That a Public Officer Had Approached Prospective Contractors With a View to Obtaining a Kick-Back, the Trial Judge Committed Reversible Error by Failing to Instruct the Jury That Extortion, Under New York Law, May Be Committed "Under Color of Official Right".

As this Court declared last Term in *Nardello v. United States,* 393 U. S. 286 (1969), the Travel Act, 18 U. S. C. § 1952, provides for a Federal overlay upon essentially State proscribed conduct. The Travel Act does not add to the totality of criminal behavior. It provides a means for certain Federal prosecutions in aid of enforcement of State criminal laws.

> "The Travel Act formed part of Attorney General Kennedy's legislative proposals to combat organized crime. . . . The Attorney General told the Senate Committee that the purpose of the Travel Act was to aid local law enforcement officials. In many instances the 'top men' of a given criminal operation resided in

one State but conducted their illegal activities in another; by creating a federal interest in limiting the interstate movement necessary to such operations, criminal conduct beyond the reach of local officials could be controlled. . . . The Attorney General's concerns were reflected in the Senate Committee Report favoring adoption of the Travel Act. The Report, after noting the Committee's belief that local law enforcement efforts would be enhanced by the Travel Act, quoted from the Attorney General's submission letter: 'Over the years an ever-increasing portion of our national resources has been diverted into illicit channels. Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity.' " 393 U. S. at 290-291.

Extortion and bribery are mutually exclusive crimes, under the 1909 New York Penal Law. The indictment in this case, as it was sent to the jury, charged the defendants with a Federal conspiracy to commit the New York crime of bribery. There was no charge against the defendants derived from the New York offense of extortion. The trial judge charged the jury that they must acquit if the crime of extortion was made out. But the trial court incorrectly defined extortion. He crucially shortened the definition to omit the type of extortion committed "under color of official right." New York Penal Law § 850.

New York law, under the 1909 Penal Law, clearly separates bribery and extortion. These were held to be mutually exclusive offenses. See, *e.g., People v. Dioguardi,* 8 N. Y. 2d 260, 203 N. Y. S. 2d 870, 168 N. E. 2d 683 (1960); *People v. Feld,* 262 App. Div. 909, 28 N. Y. S. 2d 796 (2d

Dep't 1941); *cf. People v. Josie*, 134 N. Y. S. 2d 183 (Bronx County 1954). As defined by the courts of New York, the essence of bribery is the voluntary giving of something of value to influence performance of official duty. The essence of extortion is the involuntary payment or payment under duress.

This Court was faced in *United States v. Nardello, supra*, with an argument that would have narrowly construed extortion for purposes of the Travel Act to offenses so labelled in State criminal codes. The Travel Act, like New York law, clearly separates and differentiates bribery and extortion. The definition of "unlawful activity" in § 1952(b)(2) is: "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States." The distinction between the offenses of bribery and extortion found in the 1909 New York Penal Law is tracked in the Travel Act. Unlike the argument in *Nardello*, therefore, the contention here would not take the conduct outside the scope of the Travel Act. That Act covers both bribery and extortion. However, in this case, the indictment charges only the "unlawful activity" of bribery under the laws of the State of New York.

The question presented here, therefore, is an important development in working out the relationship between the Federal Travel Act and State "unlawful activity." The Court could usefully take up the limits of the principle enunciated in *Nardello* that Federal prosecutions are not strictly tied to the crime that happens to be called "extortion." It should not follow that the differentiation in State law and in the Travel Act between the broad crimes of extortion and bribery is without meaning.

4. Whether, Where State Law Demands Corroboration of Accomplice Testimony in Order to Sustain a Conviction, It Was Prejudicial Error Not to So Charge the Jury in a Federal Prosecution Based Upon "Unlawful Activity" as Defined in State Law.

Although petitioner was convicted of a Federal offense derivative from State law, the case, as submitted to the jury, would not sustain a conviction in the State courts. Under New York law, a defendant cannot be convicted of bribery upon the uncorroborated testimony of an accomplice or accomplices. The trial judge charged the jury in this Federal case that they could return a verdict of guilty even though the prosecution's case was based entirely upon accomplice testimony.

The relationship in the Travel Act between Federal and State law was developed in connection with the preceding question. The "unlawful activity" in this case was defined entirely by the law of New York. As a matter of New York law, bribery cannot be proved by accomplice testimony alone. N. Y. Code of Criminal Procedure § 399. The testimony of two or more accomplices is not sufficient to satisfy the requirement of corroboration; testimony of one is not corroborative of testimony of others. *E.g., People v O'Farrell,* 175 N. Y. 323, 67 N. E. 588 (1903); *People v. Negrin,* 24 Misc. 2d 181, 201 N. Y. S. 2d 59 (1960).

The Court of Appeals, rejecting this contention, held that: "The conduct of criminal trials in the Courts of the United States is governed by the Federal Rules of Criminal Procedure and by rulings of the federal courts in matters of procedure and practice not explicitly or by clear implication covered by these Rules. Federal law does not require corroboration of accomplice testimony to sustain a conviction. *Caminetti v. United States,* 242 U. S. 470, 495 (1917);

McCullough v. United States, 403 F. 2d 1013, 1015 (9th Cir. 1968); *United States v. Carrique*, 316 F. 2d 186, 187 (2d Cir. 1963); *United States v. Agueci*, 310 F. 2d 817, 833 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963)." (Appendix A, *infra*, pp. 37a-38a).

None of the cases cited by the Court of Appeals is similar to the Travel Act in providing a Federal offense to aid in the enforcement of State criminal law. In each of the cited cases, the prosecution concerns an offense defined entirely by Federal law without reference to local crime. The Travel Act is a different kind of Federal offense, created not to enlarge the definition of criminal behavior, but rather to enable Federal prosecutions in situations where local law enforcement officials were hampered by defendants operating outside the State borders.

There is nothing in the Travel Act or any of its legislative history that suggests a purpose to enact a Federal law that permits prosecutors to escape the protections erected by State law to guard against improper convictions. New York's requirement of corroboration is not imposed as a purposeless obstacle to hinder prosecutors. Its obvious purpose is to insist on certain minimum standards of proof. The construction of the Travel Act by the Court of Appeals permits the use of a Federal law to overcome this protective measure of State law. The Travel Act was adopted to assist local law enforcement officials, to be sure. It was not designed to do so by enabling them to render nugatory the safeguards built into State law.

The question posed here is one that touches sensitive issues of Federal-State relations. Such questions patently warrant this Court's determination. The Court of Appeals relied upon an overly broad shibboleth that Federal trials are governed by Federal rules of procedure and practice. This Court should intervene to insure that the Travel Act

does not become a vehicle for riding roughshod over State law.

In the trial court representations were made that the Government had conducted no electronic surveillance of the petitioner except for that made by Itkin. Petitioner assumes that the Solicitor General will inform the Court if the above representations require any modification.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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